correctly directed himself and directed the assessors as to the nature of the defence of provocation and as to the *quantum* of proof regarding it. What he said with regard to himself is:—

"I am in no way satisfied on balance of the evidence, bearing in mind both the events of the previous day and those on the morning of the 21st July, that the accused was so gravely and suddenly provoked as to be deprived of his self control when he struck Maria."

If he had stopped there he would have been wrong. But he went on:—

"Nor has he raised doubts in my mind which should be resolved in his favour."

In our view that passage taken as a whole correctly states the law regarding the *quantum* of proof as explained in the African case of *Kwaku Mensah* v. *The King*.[2]

There was ample evidence which when viewed in the light of that statement supported the judge's views that the case was one of murder and not of culpable homicide not amounting to murder. There was no question of inadmissible evidence. In the circumstances we do not think we are justified in interfering with the conviction.

The appeal is dismissed.

Appeal dismissed.

LEE HOO BOON v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Harley Ag.C.J. (Borneo) and Raja Azlan Shah J.) April 26, 1966]

[K.L. — Federal Court Criminal Appeal No. X. 11 of 1966]

Internal Security — Consorting with armed Indonesians — Possession of arms and ammunition — Availability of defences of mistake and accident under Penal Code — Admissibility of statement by accused — Application to refer to statements by witnesses.

Geneva Conventions Act, 1962 — Whether accused a Johore national — Whether prisoner of war — Whether entitled to benefit of Geneva Conventions — Construction of conventions and treaties — Internal Security Act, 1960, ss. 57 & 58.

The appellant was convicted on charges of consorting, possession of arms and possession of ammunition in contravention of sections 57(1)(a), (b) and 58(1) of the Internal Security Act, 1960. The evidence connecting the appellant with the items of ammunition mentioned in the charge was very tenuous and on appeal this was conceded and the conviction on this charge was set aside. The other grounds of appeal were (a) the statement made by the appellant to the police was wrongly admitted in evidence, as it was made under the influence of physical attacks previously made on the appellant. There was also the possibility of misunderstanding because the appellant and the police officer who took the statements from him spoke different dialects of the Hokkien dialect, (b) the trial judge wrongly refused to refer to statements made to the police by two Indonesian witnesses, (c) the appellant was entitled to the defences of mistake and accident under the Penal Code because when the appellant and the other Indonesians left Indonesia in the aircraft they were of the impression that they were on a practice flight and not on an invasion of Malaysia and (d) on the evidence the appellant was a member of the Indonesian military forces (he was wearing Indonesian military uniform at the time of arrest) and that he was a prisoner of war and was therefore entitled to the benefit of the Geneva Conventions although this matter was not raised at the trial.

Held: (1) the statement of the appellant was rightly admitted, as the learned trial judge had rejected the appellant's story and found that the statement was voluntary. As there was evidence to show that persons speaking the Hokkien dialect can understand each other irrespective of whatever variety of the dialect of that language was spoken and as there was no evidence to the contrary the court was not prepared to hold that there was any possibility of misunderstanding between the appellant and the police officer who took his statement;

(2) the learned trial judge was wrong in refusing the invitation by counsel to refer to statements made by the witnesses but the case fell within the proviso to section 60(1) of the Courts of Judicature Act, 1964 as there had been no substantial miscarriage of justice;

(3) although the appellant was entitled to avail himself of the defences set out in the Penal Code. this ground of appeal was without any substance in view of what the court had already said in *Tan Hua Lam* v. *Public Prosecutor;* [1]

(4) as the appellant was born in Johore it must be presumed that whatever the position as regards his citizenship he was a Johore national and was therefore not entitled to the benefit of the Geneva Conventions.

[Editorial Note: This case was dissented from by the Federal Court in *Ooi Hee Koi* v. *Public Prosecutor* and *Ooi Wan Yui* v. *Public Prosecutor*, reported at p. 183 *post*.**]**

Cases referred to:—

(1) *Tan Hua Lam* v. *Public Prosecutor* [1966] 1 M.L.J. 147.

(2) *Clifford* v. *O'Sullivan* [1921] 2 A.C. 570.

FEDERAL COURT.

C. Thambiah for the appellant.

Nik Saghir bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This is another appeal arising from the Indonesian invasion which took place at Labis on the night of 1st /2nd September, 1964. The present appellant was thought to have been one of the persons who took part in that invasion and in consequence he was prosecuted on charges of consorting, possession of arms and possession of ammunition in contravention of sections 58(1), 57(1)(a) and 57(1)(b) of the Internal Security Act, 1960. He was convicted on all three charges and sentenced to death.

Against these convictions he has now appealed.

There are numerous grounds of appeal which have been argued, if I may say so, extremely competently and extremely persuasively, but not all of them merit consideration.

Before proceeding to deal with those which in our view do merit consideration, and at least

one of them merits serious consideration, I propose to deal with the conviction on the third charge — possession of ammunition.

It has been conceded that the evidence connecting the appellant with the items of ammunition mentioned in the charge can only be described as very tenuous and certainly not sufficient to support a conviction. With that we agree and we accordingly set aside the conviction on the third charge.

To proceed with the appeals against the other two convictions, it is not necessary in our view to consider the evidence at great length; it is not really necessary to go beyond the evidence of Captain Sanders. His evidence was that on the 7th of September, that is five days after the air-drop, he was at Kampong Tenang commanding a company of the 1/10 Gurkha Rifles. He saw three individuals in uniform at a distance of 500 yards away. He and his troops attacked them and after some firing one of them, an Indonesian, was killed and the other two, both Chinese, were captured. One of those who were captured was the present appellant. The witness, a trained soldier, stated categorically that immediately prior to his capture the appellant was carrying a sten-gun. There is, we appreciate, some doubt as to whether that sten-gun was the same sten-gun that was subsequently produced in evidence by the police. Nevertheless having regard to Captain Sanders' skill in these matters and having regard to the fact that his evidence was never contradicted, because the appellant himself did not give evidence at the trial, it is our view that that evidence alone would support the convictions for consorting and for possession of arms.

There is, however, a considerable body of other evidence. There is the evidence of two Indonesian soldiers who were in the aircraft which brought the party from Indonesia and who identified the appellant and there was a statement which was made by the appellant to the police and admitted in evidence under section 75(1) of the Internal Security Act which admitted every element in the offences charged against him excluding the element of possession of ammunition which we have already disposed of. And as has been said, Captain Sanders' evidence was not denied.

I proceed now to deal with such of the grounds of appeal as merit consideration.

In the first place it was said that the statement made to the police by the appellant was wrongly admitted in evidence. It was not a free and voluntary statement. It was made under the influence of physical attacks previously made on the appellant and moreover there was some considerable possibility of misunderstanding because the appellant and the police officer who took the statement spoke different dialects of the Hokkien dialect of the Chinese language.

With regard to the question of whether it was voluntary or not the trial judge who heard the evidence of the police witnesses and of the appellant came to the conclusion that the appellant's story was not true, that he was not attacked and assaulted as he alleged he was, and that finding, turning as it does on questions of relative credibility, is not one with which it is open to us to interfere.

With regard to the language question, there was evidence that persons speaking the Hokkien dialect can understand each other irrespective of whatever variety of dialect of that language they speak. In our experience it is not the practice of the courts to differentiate between the various forms of the Hokkien dialect and in the circumstances and in the absence of any real evidence to the contrary we are not prepared to say there was any possibility of misunderstanding between the appellant and the officer who took his statement.

Then it is said that the trial judge was invited to refer to statements made to the police by the two Indonesian witnesses and that he refused to do so. For reasons which we stated in the previous case of *Tan Hua Lam* v. *Public Prosecutor* [1] we are of the opinion that on that point the appeal is successful. We are, however, of the same opinion as we were in the previous case that the case falls within the proviso to section 60(1) of the Courts of Judicature Act, 1964, which is the same as section 4(1) of the United Kingdom Criminal Appeal Act. We consider there has been no substantial miscarriage of justice.

Then an argument has been addressed to us that there was a certain amount of evidence, that of the Indonesian witnesses, which suggested that when the aircraft left Medan the people in it were under the impression that they were engaged in a practice flight and not in an actual invasion of this country. On that it was submitted that the appellant was entitled to avail himself of the defences of mistake, accident and so forth dealt with in sections 76, 79 and 80 of the Penal Code.

Now, of course, it was decided again and again under the old Emergency Regulations and we have decided again and again under the Internal Security Act that a party prosecuted under the Emergency Regulations or under the Internal Security Act is entitled to avail himself of the defences set out in the Penal Code.

In the present case, however, the argument addressed to us is the same as that which was addressed to us in the case of *Tan Hua Lam* v. *Public Prosecutor, supra,* and for the reasons

we stated in that case and which we find it unnecessary to repeat we are of the opinion that in the present case the ground of appeal based on sections 76, 79 and 80 is without substance.

I now come to the only ground of appeal which has given us some concern.

It was argued that on the evidence the appellant was a member of the Indonesian military forces. He had associated himself with them. He had been trained by them. He formed part of an organised company with them. He was wearing Indonesian uniform. He was carrying Indonesian weapons. Then it was said that the relationship between this country and the Republic of Indonesia if it did not amount to actual war in the conventional Grotian sense amounted to a state of hostilities as envisaged by the Geneva Conventions of 1949 relating to prisoners of war. In the circumstances the appellant was entitled to the benefit of these Conventions to which this country is a party and which have become part of our municipal law by reason of the Geneva Conventions Act, 1962. At the trial he did not claim the protection of the Conventions but we have listened to a long and careful argument to the effect that nonetheless he was entitled to that protection.

The grounds on which it has been argued that the appellant was a member of the Indonesian military forces have been stated. There is, however, one other relevant fact and that is that on the appellant's own admission he was born in the State of Johore. There is no other evidence having any bearing on his national status and from the admitted fact that he was born in the State of Johore then in the absence of anything to the contrary it must be presumed that whatever the position as regards citizenship he is at all material times a Johore national.

That being so, in our view he is not entitled to the benefit of the Geneva Conventions.

With regard to the Conventions I would observe that they are a treaty or, at any rate, an international agreement analogous to a treaty and treaties are not to be interpreted in the same way as ordinary contracts. What I have in mind is better said than I can say it by Professor Keith in *Wheaton's* Elements of International Law (6th Ed.) at page 522:—

> "The general principle is that treaties, being compacts between nations, are not to be subjected to the minute interpretation which in private law may result in defeating through technical construction the real purpose of the negotiators."

Bearing that in mind we are entitled to conclude that the parties to the Geneva Conventions had in mind the general principles of international law and of the law of nations and on the particular point with which we are concerned here I would read a passage by Dr. Lauterpacht from *Oppenheim's* International Law (7th Ed.). He discusses in Chapter VI the armed forces of the belligerents in general and their privileges in particular and he concludes with the following passage (p. 268):—

> "The privileges of members of armed forces cannot be claimed by members of the armed forces of a belligerent who go over to the forces of the enemy and are afterwards captured by the former. They may be, and always are, treated as criminals. The same applies to traitorous subjects of a belligerent who, without having been members of his armed forces, (that is their own armed forces) fight in the armed forces of the enemy. Even if they appear under the protection of a flag of truce, deserters and traitors may be seized and punished."

In our view the Geneva Conventions are to be read in the light of that statement which after all is a statement of a principle of international law by a recognised authority and read in that light the present appellant is not entitled to the protection of the Conventions even if he did become a member of the Indonesian Armed Forces because he was a traitorous subject of the Ruler of the State of Johore and was engaged in assisting the Republic of Indonesia in armed conflict with this country of which Johore is part.

Although I do not think the expression has actually been used there is no getting away from the fact that the Internal Security Act, and in particular section 57, does create what might be called a form of constructive treason. It was introduced as far as I am aware by the British in the Irish troubles of 1920 by proclamation under martial law the provisions of which were enforced not by the civil courts but by military courts (see *Clifford* v. *O'Sullivan*).[2] It was used again by the British Government in Palestine during the troubles there. It was introduced in this country in 1948 to deal with the communist troubles under the Emergency Regulations Ordinance 1948 which was the authority for the Emergency Regulations with which became so unfortunately familiar during the ensuing years. And now it has become part of the permanent local apparatus of the country.

For these reasons then we would dismiss the appeals against the first and second convictions.

Appeals dismissed.

Solicitors: *Xavier & Thambiah.*

TOWN HOUSE HOTEL LTD. v. SHANGHAI HALL LTD.

[O.C.J. (Abdul Aziz J.) April 28, 1966]

[K.L. — Civil Suit No. 92 of 1966]

Landlord and Tenant — Notice to quit — Sufficiency of — Triable issue.

Practice and Procedure — Order 14 — Application for leave to sign final judgment — Triable issue — Leave to defend on giving security — R.S.C., 1957, O. 14 r. 1.